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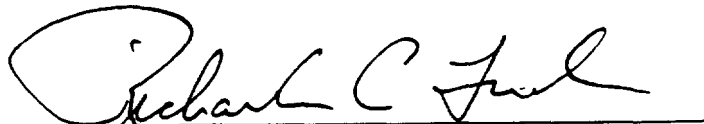
William R. Burkett
General Counsel of the Corporation Commission
Rachel Lawrence Mor
Deputy General Counsel
Andrea Johnson
Senior Attorney
P.O. Box 52000-2000
Oklahoma City, OK 73152-2000

A.P. Murrah, Jr.
Melvin R. McVay, Jr.
PHILLIPS McFALL McCAFFREY McVAY & MURRAH
One Leadership Square, Twelfth Floor
211 North Robinson
Oklahoma City, OK 73102

Mark Witcher
Michelle Bourianoff
AT&T COMMUNICATIONS OF THE SOUTHWEST
919 Congress Avenue, Suite 1500
Austin, TX 78701

Michael D. Warden
David L. Lawson
Rudolph M. Kammerer
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, DC 20006

Attorneys for AT&T Communications of the Southwest, Inc.


RICHARD C. FORD

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

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DES MOINES, IOWA

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CLERK U.S. DISTRICT COURT
SOUTHERN DISTRICT OF IOWA

U S WEST COMMUNICATIONS, INC.,

Plaintiff,

v.

ALLAN T. THOMS et al.,

Defendants.

CIVIL NO. 4-97-CV-70082

MEMORANDUM OPINION,
RULING GRANTING AT&T'S
AND MCI'S MOTION FOR
RECONSIDERATION AND
ORDER AMENDING JUDGMENT

AT&T Communications of the Midwest, Inc. ("AT&T") and MCI Metro Access Transmission Services, Inc. ("MCI") bring this motion for reconsideration in light of an intervening change in the controlling law regarding the interpretation and application of the Telecommunications Act of 1996 (the "Act").¹ In its order "Affirming Some Provisions of the Interconnection Agreements and Remanding Others" (hereinafter "Initial Decision"), this court relied on the law as it existed after the Eighth Circuit Court of Appeals decision in Iowa Utilities Board v. FCC, 120 F.3d 753 (8th Cir. 1997) ("IUB I"). Remarkably, about one hour after this court filed its opinion the United States Supreme Court issued its decision in AT&T v. Iowa Utilities Board, 119 S. Ct. 721 (1999) ("IUB II"), affirming in part and reversing in part the judgment of the Eighth Circuit Court of Appeals in IUB I.

AT&T and MCI filed their motion for reconsideration within 10 days of entry of the judgment on this court's order, and they recite that they file it pursuant to Fed. R. Civ. P. 59. Although the Federal Rules of Civil Procedure do not recognize a

¹ The provisions of the Act most pertinent to these proceedings are located at 47 U.S.C. §§ 251-252. On page two of its initial ruling filed on January 25, 1999, however, this court mistakenly referred to title 28 of the United States Code when discussing provisions of the Act. Thus, the citations to 28 U.S.C. § 251(c), 28 U.S.C. § 251(e)(1), and 28 U.S.C. § 252, are amended to read, respectively, 47 U.S.C. § 251(c), 47 U.S.C. § 251(c)(1), and 47 U.S.C. § 252.

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BY D. D. D.

motion for reconsideration, see see Sanders v. Clemco Indus., 852 F.2d 161, 163 & 170 (8th Cir. 1988) (noting that a motion for reconsideration is not described by any particular rule of federal civil procedure), generally a motion for reconsideration that is filed within 10 days of the entry of judgment is treated as a motion to alter or amend judgment pursuant to Fed. R. Civ. P. 59(e). See id. at 168-171 & n.11; see also In re Trout, 984 F.2d 977, 978 (8th Cir. 1993) (construing a motion to reconsider filed within ten days of the filing date of the initial order to be a 59(e) motion); DeWit v. Firststar Corp., 904 F. Supp. 1476, 1494 (N.D. Iowa 1995) (construing a motion to reconsider filed within ten days after the judgment to be a 59(e) motion); 12 James Wm. Moore et al., Moore's Federal Practice § 59.30[7] (3d ed. 1998) (same); cf. Retired Chicago Police Ass'n v. City of Chicago, 76 F.3d 856, 862 n.1 (7th Cir. 1996) (same). Because AT&T and MCI filed their motion for reconsideration within 10 days of the entry of judgment in this case, the motion is a timely filed rule 59(e) motion.²

A motion to alter or amend a judgment is appropriate when there has been an intervening change in the controlling law. See Laughlin v. Jensen, 148 B.R. 315, 315 (D. Neb. 1992) (recognizing that rule 59(e) motion may be based on intervening change in controlling law); see also Atlantic States Legal Found., Inc. v. Karg Bros., Inc., 841 F. Supp. 51, 53 (N.D.N.Y. 1993) (same); Gregg v. American Quasar Petroleum Co., 840 F. Supp. 1394, 1401 (D. Colo. 1991) (recognizing that motion for reconsideration under 59(e) is proper where there has been a significant change or development in the law since the submission of the issues to the court); 12 James Wm. Moore et al., Moore's Federal Practice § 59.30[3][a][i-ii] (3d ed. 1998). There is no doubt that the Supreme Court's IUB II decision constitutes an intervening change in controlling law. The question is, therefore, what issues addressed in this court's Initial Decision need to be readdressed

² Fed. R. Civ. P. 59(e) provides: "Any motion to alter or amend a judgment shall be filed no later than 10 days after entry of the judgment."

in light of the intervening change in the law. The parties have filed briefs addressing this question and the motion is submitted.

The Supreme Court's Decision

In its IUB II decision, the Supreme Court changed the law in three respects potentially affecting this court's Initial Decision. First, the Supreme Court reversed the Eighth Circuit Court of Appeals and concluded that the Federal Communications Commission ("FCC") has jurisdiction to design a pricing methodology, thereby reinstating federal pricing regulations previously vacated by the court of appeals.¹ See IUB II, 119 S. Ct. at 729-33. Second, the Supreme Court vacated 47 CFR § 51.319, previously upheld by the court of appeals, which gave competitive local exchange carriers ("CLECs") blanket access to a laundry list of network elements. The Court vacated this rule because it concluded that the FCC granted blanket access to the listed elements based upon an improper interpretation of the "necessary" and "impair" standards contained in 47 U.S.C. § 251(d)(2). See id. at 734-736. Although the Court did not specifically vacate 47 CFR § 51.317, the rule articulating the FCC's interpretation of the "necessary" and "impair" standards as it applies to other non-listed network elements, the Court's analysis of rule 319 apparently sounds the death-knell for rule 317 as well. Finally, the Supreme Court reinstated 47 CFR § 51.315(b), previously vacated by the court of appeals, which prevents incumbent local exchange carriers ("ILECs"), except upon request, from separating requested network elements that the ILEC currently combines. See id. at 736-738. The impact of these changes in the law on issues previously decided by this court are discussed, in turn, below.

¹ The pricing rules previously vacated by the court of appeals on jurisdictional grounds include: 47 C.F.R. §§ 51.501-51.515 (inclusive, except for section 51.515(b) which was not vacated by the court of appeals), 51.601-51.611 (inclusive), & 51.701-51.717 (inclusive). See IUB I, 120 F.3d at 800 n.21.

Issues to be Reconsidered

I. The Pricing Issues

In its previous order, this court addressed two pricing issues raised by MCI: (1) the failure of the Iowa Utilities Board (the "Board") to set cost-based interconnection and access to unbundled network element rates, and (2) the failure of the Board to de-average unbundled network element rates. In both instances, this court affirmed the approach taken by the Board. The Board's approach to these issues, although consistent with the general code language, see 47 U.S.C. §§ 251(c) & 252(d), did not comply with the FCC regulations applying those code provisions. At the time the Board rendered its pricing decision, it was under no obligation to comply with the FCC's rules because they had already been vacated by the court of appeals in IUB I. Now that the Supreme Court has reinstated the FCC's pricing rules, however, the Board's approach to both of these pricing issues is inconsistent with federal law.

The FCC's rules regarding the pricing of interconnection and access to network elements are located in 47 CFR §§ 51.501-515. These rules provide that the state commission, i.e., the Board, must establish the rates either pursuant to the forward-looking economic cost-based pricing methodology set forth in §§ 51.505 and 51.511, or consistent with the proxy ceilings and ranges set forth in § 51.513. See 47 CFR § 51.503. The forward-looking economic cost-based pricing methodology referenced in the first option is the sum of the total element long-run incremental cost ("TELRIC") of the element, as described in section 51.505(b), and a reasonable allocation of forward-looking common costs, as described in section 51.505(c). See 47 CFR § 51.505(a). The Board adopted neither the TELRIC option nor the proxy option in establishing rates for interconnection and access to unbundled elements. Indeed, the Board specifically rejected the TELRIC methodology because the Board was unwilling to accept two of its underlying assumptions. See Board's Final Decision and Order, at 13-14 (April 23, 1998), as modified by order on June 12, 1998. In its stead, the court adopted an incremental cost approach. See id. at 14-15. By adopting a pricing methodology other than

those specified in the FCC's pricing rules, the Board's pricing approach is inconsistent with current federal law. Accordingly, this pricing issue will be remanded to the Board with direction to comply with the FCC's pricing rules.

The FCC's pricing rules reinstated by the Supreme Court also address the de-averaging issue. Section 51.503(b) of code of regulations provides that an ILEC's rates for each element it offers must comply with the rate structure rules set forth in section 51.507. See 47 CFR § 51.503(b). Subsection (f) of section 51.507 requires state commissions, i.e., the Board, to "establish different rates for elements in at least three defined geographic areas within the state." 47 CFR § 51.507(f). In its Final Decision and Order, the Board refused to establish different rates for different areas of the state, deciding instead to adopt a statewide average rate for each particular element. See Board's Final Decision and Order, at 33-35. Although this court, in its Initial Decision, accepted the Board's approach as being cost-based, albeit a statewide average cost, the Board's approach is inconsistent with the FCC's pricing rules reinstated by IUR II. Accordingly, the Board is ordered on remand to readdress the de-averaging issue and to, at a minimum, comply with the requirements of the FCC's rules.⁴

II. The "Necessary" and "Impair" Standards

In 47 U.S.C. § 251(d), Congress authorizes the FCC to establish regulations to implement the requirements of section 251. That authorization includes a grant of authority to determine what network elements should be made available to CLECs on an unbundled basis pursuant to section 251(e)(3). Congress requires the FCC, in making that determination, to consider, at a

⁴ This court is well aware that the FCC pricing rules have yet to be approved by the Eighth Circuit Court of Appeals on their merits. The court cannot, however, refuse to apply the law as it currently exists based upon the possibility that the law may be changed by subsequent court opinion. Of course, if the parties truly wish to avoid such uncertainty, they should take their duties to negotiate in good faith to heart and reach a mutual agreement as to all of these contested issues. See 47 U.S.C. § 251(c)(1). I strongly encourage them to do so.

minimum, whether "(A) access to such network elements as are proprietary in nature is necessary; and (B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer." 47 U.S.C. § 251(d)(2) (emphasis added). Pursuant to this grant of authority, the FCC established a list of network elements that satisfied the necessary and impair standards, and therefore had to be made available by ILECs upon request, and listed those elements in 47 CFR § 51.319. See IUB II, 119 S. Ct. at 734-35 (outlining the approach taken by the FCC in its First Report and Order). The Supreme Court rejected this list of network elements, however, because the Court concluded that the FCC did not properly interpret and/or apply the necessary and impair standards contained in section 251(d)(2) when developing the list. See IUB II, 119 S. Ct. at 734-35.

In 47 CFR § 51.317, the FCC articulated its standards for identifying network elements, other than those listed in section 51.319, which, upon request, must be made available to CLECs on an unbundled basis. The standards articulated by the FCC in section 51.317 are the same interpretation of the necessary and impair standards the Supreme Court found wanting in its analysis of section 51.319. Accordingly, the standards articulated in section 51.317 no longer appear to be good law.

The only network element required by the Board to be provided on an unbundled basis pursuant to the standards articulated in section 51.317, and challenged by a party to the interconnection agreement, is the "dark fiber" element. In its Final Arbitration Decision on Remand, the Board concluded that dark fiber should be provided as a network element because it satisfies the FCC's test for a nonproprietary element "that denial of unbundled access to the network element would decrease the quality or increase the cost to a CLEC of providing a service." Board's Final Arbitration Decision on Remand, at 31-32 (citing the IUB I decision which upheld the FCC's interpretation of the impairment standard). This court affirmed the Board's finding based upon the Board's application of the now-defunct

impairment standard articulated by the FCC. See Initial Decision, at 40-41. Because the Board and this court relied on an improper interpretation of the impairment standard in requiring the ILEC to provide dark fiber on an unbundled basis, the dark fiber issue is remanded to the Board for a re-determination as to whether the ILEC must provide access to its dark fiber, a network element, on an unbundled basis.⁵

MCI urges this court to not remand this issue to the Board, but instead hold the question in abeyance, pursuant to the doctrine of primary jurisdiction, until the FCC has completed its rulemaking process and adopted a revised interpretation of the impairment standard. This court declines to do so. It is extremely unlikely that the FCC's new regulations would allow this court, as MCI suggests, to adjudicate the dark fiber issue on the record as it exists. Rather, this court would eventually have to remand the issue to the Board for a determination, in the first instance, of whether the provision of dark fiber satisfies the new standard. This court would then review, upon request, the Board's decision. See 47 U.S.C. § 252(e)(6) (establishing that it is this court's duty to review determinations made by state commissions, not to make such determinations in the first instance). It is precisely because the Board is better equipped to handle such a determination in the first instance that this court remands the issue to the Board at this time. See MCI's Brief in Support of Motion to Reconsider, at 18 (citing Far East Conf. v. United States, 342 U.S. 570, 574-75 (1952), for the proposition that agencies are better equipped than courts by specialization, insight gained by experience, and more flexible procedures to resolve specialized or technical issues). On remand, the Board can determine whether there is another basis for requiring the ILEC to provide dark fiber, whether it should delay the determination until after the FCC's new rules are

⁵ The Supreme Court's decision in IUB II did not affect the Board's and this court's determination that dark fiber is a network element. Accordingly, the Board need not reexamine that issue on remand.

released, or whether it should take another course of action.

III. The Combination of Elements Issue

The initial interconnection agreement arbitrated and accepted by the Board required the ILEC to provide network elements individually, and in combination with other network elements. See Original Agreement § 37. This approach was called into question by the court of appeals in IUB I. In that decision, the court of appeals vacated subsections (b)-(f) of 47 CFR § 51.315, which speak to the issue of an ILEC's duty to provide network elements in combination. Subsection (b) of section 51.315 prohibits an ILEC, except upon request, from separating requested network elements that the ILEC currently combines. See 47 CFR § 51.315(b). Subsections (c)-(f) of section 51.315 require the ILEC, upon request, to combine other network elements, even if those elements are not ordinarily combined in the ILEC's network, provided that certain conditions are met. See 47 CFR § 51.315(c)-(f). The court of appeals in IUB I vacated subsection (b) of section 51.315 because section 251(c)(3) of the Act provides for access to network elements only on an unbundled basis, not a combined basis. See IUB I, 120 F.3d at 813. In addition, the court of appeals concluded that allowing CLECs to purchase the ILEC's elements on a combined basis would obliterate the distinction between access to unbundled network elements and the purchase of an ILEC's retail services for resale. See id. The court of appeals vacated subsections (c)-(f) of section 51.315 because the court concluded that the language of section 251(c)(3) of the Act—"[an ILEC] shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements"—unambiguously indicates that requesting carriers, not incumbents, have the responsibility of combining those network elements provided by the ILEC on an unbundled basis. See id.

In light of the court of appeals' decision, the Board modified the interconnection agreement on remand to provide:

The ILEC shall offer each Network Element individually or may, in the ILEC's sole discretion except where Network Elements are inextricably combined, e.g.

switching and signalling, offer them in combination * *

* * * *

For each Network Element, the ILEC shall have only the following options with regard to recombining with other Network Elements:

- (1) The ILEC can elect to not separate the Network Element from other Network Elements with which it is combined;
- (2) The ILEC can provide its own personnel to the CLEC to recombine the Network Element with other Network Elements as requested by the CLEC;
- (3) The ILEC can elect "recent change" technology, which is switching software somewhat like an on/off switch that allows the CLEC to recombine some Network Elements;
- (4) The ILEC can elect to have a third-party technician acceptable to both the ILEC and the CLEC recombine the Network Elements; and
- (5) The ILEC can elect to allow the CLEC's technician recombine the Network Elements.

Where options 4 or 5 are selected, ILEC may require that ILEC personnel accompany the third-party or CLEC personnel as they do the recombining of Network Elements. Where ILEC personnel accompany the third-party or CLEC personnel, ILEC shall bear the expense of its personnel, and CLEC shall bear the recombining expense of the third-party or its own personnel.

Interconnection Agreement on Remand § 37. This approach was consistent with IUB I, in that the ILEC was not required to provide network elements in combination nor required to recombine unbundled elements on behalf of the CLEC. Accordingly, in its Initial Decision, this court affirmed the Board's approach. See Initial Decision, at 28-30.

In IUB II, however, the Supreme Court reversed the court of appeals' decision as it related to subsection (b) of 47 CFR § 51.315. See IUB II, 119 S. Ct. at 737 (finding rule 315(b) to be a reasonable interpretation of the Act). In so doing, the Court concluded that the language of section 251(c)(3) of the Act—"an ILEC] shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements"—merely forbids ILECs from sabotaging unbundled network elements in such a way as to preclude them from ever being recombined. See IUB II, 119 S. Ct. at 737. This language does not, the Court

reasoned, "say, or even remotely imply," that the ILEC must provide the network elements only in an unbundled, and never a combined, form. See id. Accordingly, the Court found section 251(c)(3) of the Act to be ambiguous on whether leased network elements may or must be separated, and concluded that the FCC's interpretation contained in section 51.315(b) had a rational basis in the Act's nondiscrimination requirement. See id. Indeed, the Court cited with approval the FCC's rationale for the rule—the rule "is aimed at preventing incumbent LECs from 'disconnect[ing] previously connected elements, over the objection of the requesting carrier, not for any productive reason, but just to impose wasteful reconnection costs on new entrants.'" Id. (quoting Reply Brief for Federal Petitioners 23).

The change in law brought about by the Supreme Court's IDE II decision renders the Board's approach to the combination issue, at least in part, inconsistent with federal law. To the extent section 37 of the Interconnection Agreement on Remand allows the ILEC to choose to unbundle network elements that it currently combines, even in the face of a request from a CLLEC for the elements to be provided in their combined form, the agreement is inconsistent with current federal law. See 47 CFR § 51.315(b). Thus, the combination issue will be remanded to the Board to modify the interconnection agreement so as to prevent the ILEC from unbundling network elements that it currently combines in contradiction of 47 CFR § 51.315(b).⁴

It should be noted that the Supreme Court reversed only the court of appeals' decision as it related to subsection (b) of section 51.315; it did not address subsections (c)-(f), which were also vacated by the court of appeals. See IDE II, 119 S. Ct. at 736-38. Accordingly, the Board's approach to combining

⁴ The Board apparently predicted such a change in the law, as it included a clause in section 37 of the Interconnection Agreement on Remand notifying the parties that the combination approach adopted by the Board was subject to modification in the event the Supreme Court reversed the combinations portion of the IDE I decision. See Interconnection Agreement on Remand § 37.

network elements not currently combined in the ILEC's network system—allowing the ILEC to choose between combining the elements for the CLEC, utilizing recent change technology, allowing a third party to combine the elements, or allowing the CLEC to combine the elements—remains a viable approach under the law. The Board need only modify the agreement so as to eliminate any suggestion that the ILEC can choose to unbundle elements that it currently combines in its own system, in contravention of a request from a CLEC for the elements in their combined form. In other words, an ILEC may not be given discretion to deny a request for network elements in a combined form if the ILEC combines those same elements in its own system. If the elements requested by the CLEC are not utilized in a combined form by the ILEC in its own system, the ILEC need only provide the elements in an unbundled form, and the ILEC cannot be required to combine the elements for the CLEC's benefit. The Board should modify the interconnection agreement accordingly.'

IV. Other Issues

In its Initial Decision, this court remanded the issue concerning the collocation of remote switch modules ("RSMs")

⁷ US West Communications, Inc. ("US West") contends that this court lacks jurisdiction to revisit its initial ruling on the combination issue because neither AT&T nor MCI, the parties who filed this motion to reconsider, challenged the Board's approach to the combination issue in the initial section 252(e)(6) proceeding. I disagree. Pursuant to MCI's and AT&T's motion to reconsider, this court may reconsider any of its determinations in its Initial Decision which are affected by the intervening change in the controlling law, regardless of which party initially challenged the agreement provision or which party filed the motion to reconsider. For example, upon reconsideration, the court accepted US West's argument and remanded the dark fiber issue even though US West did not file the motion for reconsideration.

Moreover, a practical reason supports a remand of the combination issue at this time. Undoubtedly, this issue would have been revisited pursuant to the renegotiation provision in the interconnection agreements. See Interconnection Agreement on Remand § 20.2. It is this court's conclusion that by immediately remanding the issue to the Board, the court is accelerating the renegotiation of the combination issue, a result consistent with the Act's purpose to bring about effective competition as quickly as possible.


because the Board failed to make an explicit finding that the RSMs were going to be "used for interconnection." See Initial Decision, at 54-57. On remand, the Board may, in its discretion, reconsider whether "used for interconnection" remains the appropriate test after the Supreme Court's decision in IUR XI. See IUR XI, 119 S. Ct. at 734-36 (disapproving of the FCC's broad interpretation of the word "necessary," as it is used in section 251(d)(2) of the Act); Initial Decision, at 54 (explaining that FCC interpreted the word "necessary," as it is used in section 251(c)(6) of the Act, the collocation provision, to mean "used or useful").

The rest of this court's findings and conclusions contained in its Initial Decision will remain unaltered."

ORDER

MCI's and AT&T's motion for reconsideration is GRANTED. Upon reconsideration, all provisions of this court's original order and judgment shall remain unaltered, except IT IS ORDERED that the two pricing issues; the dark fiber issue and the network element combination issue are remanded to the Board.'

Dated this 19 day of April, 1999.


HAROLD D. VICTOR
Senior U.S. District Judge

Throughout US West's "Brief on the Effect of the Supreme Court's Decision," US West repeatedly suggests that the Supreme Court's decision somehow changes the number or nature of network elements US West is obligated to provide AT&T and MCI under the interconnection agreement. In its Initial Decision, this court addressed only US West's obligation to provide dark fiber as a network element because that was the only network element that US West claimed it had no duty to provide. This court cannot reconsider a decision it did not make in its Initial Decision nor an issue that was not pursued by any party in the original proceeding. Therefore, US West remains obligated to provide all the unchallenged network elements contained in the Interconnection Agreement on Remand, including operational support systems ("OSSs") and shared transport.

Nothing in this opinion is intended to limit the procedures available to the Board for resolving these issues on remand, including allowing the parties to negotiate agreement.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

US West Communications, Inc.,
a Colorado corporation,

File No. Civ. 97-2179 ADM/AJB

Plaintiff,

vs.

Edward Garvey, Joel Jacobs,
Marshall Johnson, Gregory Scott,
and Don Storm, members of the
Minnesota Public Utilities Commission
in their official capacity,

MEMORANDUM OPINION
AND ORDER

Minnesota Public Utilities Commission,

and

Sprint Communications Company, L.P.,

Defendants.

Geoffrey P. Jarpe and Martha J. Keon, Maun & Simon, PLC; Kevin J. Saville, US West Communications, Inc.; and Wendy M. Moser, Norton Cutler, and Blair A. Rosenthal, US West, Inc., for Plaintiff US West Communications, Inc.

Dennis D. Ahlers and Megan J. Hertzler, Assistant Attorneys General, for Defendants MPUC and the Commissioners.

- David L. Sasseville, Lindquist & Vennum, and David Murray and A. Renee Callahan, Wilkie, Farr, & Gallagher, for Defendant Sprint Communications Company, L.P.

Plaintiff US West Communications, Inc., ("US West") brought this action pursuant to the Telecommunications Act of 1996 ("the Telecommunications Act" or "the Act"), specifically 47

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JUDGMENT ENTD
DEPUTY CLERK

U.S.C. § 252(e)(6), seeking judicial review of determinations made by the Minnesota Public Utilities Commission ("MPUC"). US West has named the individual commissioners of the MPUC as Defendants. For purposes of this order, the individual commissioners and the MPUC, itself, will be referred to collectively as the MPUC.

The above-captioned case is one of eight cases involving review of determinations made by the MPUC presently before this Court. On December 10, 1997, this Court issued an Order in US WEST Communications, Inc. v. Garvey, No. 97-913 ADM/AJB, slip op. at 3 (D.Minn. Dec. 10, 1997), determining the scope of review for cases brought pursuant to § 252(e)(6). The Court found the scope of review limited to an appellate review of the record established before the MPUC. Id. On May 1, 1998, the Court filed an Order addressing the standard of review in the eight Telecommunications Act cases. AT&T Communications of the Midwest, Inc. v. Centel of Minnesota, No. 97-901 ADM/JGL, slip op. at 10-11 (D.Minn. April 30, 1998). Questions of law will be subject to *de novo* review while questions of fact and mixed questions of fact and law will be subject to the arbitrary and capricious standard. Id. at 11-13.

I. BACKGROUND

Before 1996, local telephone companies, such as US West, enjoyed a regulated monopoly in the provision of local telephone services to business and residential customers within their designated service areas. AT&T Communications of the Southern States v. BellSouth Telecomms., Inc., 7 F.Supp.2d 661, 663 (E.D.N.C. 1998). In exchange for legislative approval of this scheme, the local monopolies ensured universal telephone service. Id. During this monopolistic period, the local telephone companies constructed extensive telephone networks in their service areas. Id.

Congress passed the Telecommunications Act of 1996, in part, to end the monopoly of local telephone markets and to foster competition in those markets. Iowa Utils. Bd. v. FCC, 120 F.3d 753, 791 (1997), rev'd in part sub nom., AT&T Corp. v. Iowa Utils. Bd., ___ U.S. ___, 119 S.Ct. 721 (1999) ; GTE North, Inc. v. McCarty, 978 F.Supp. 827, 831 (citing Joint Explanatory Statement of the Committee of Conference, H.R.Rep. No. 104-458, at 113 (1996)). Because the local monopolies, or incumbent local exchange carriers ("ILECs" or "incumbent LECs"), had become so entrenched over time through their construction of extensive facilities, Congress opted "not to simply issue a proclamation opening the markets," but rather constructed a detailed regulatory scheme to enable new competitors to enter the local telephone market on a more equal footing. AT&T Communications of the Southern States, 7 F.Supp.2d at 663. The Act obligates the incumbent LECs, like US West: (1) to permit a new entrant in the local market to interconnect with the incumbent LEC's existing local network and thereby use the LEC's own network to compete against it (interconnection); (2) to provide competing carriers with access to individual elements of the incumbent LEC's own network on an unbundled basis (unbundled access); and (3) to sell any telecommunication service to competing carriers at a wholesale rate so that the competing carriers can resell the service (resale). Iowa Utils. Bd., 120 F.3d at 791 (citing 47 U.S.C.A. § 251(c)(2)-(4)). In order to facilitate agreements between incumbent LECs and competing carriers, the Act creates a framework for both negotiation and arbitration. 47 U.S.C. § 252. Two sections of the Act, 47 U.S.C. §§ 251 and 252, explain the basic structure of the overall scheme for opening up the local markets.

Section 251

Section 251 describes the three relevant classes of participants effected by the Act:

(1) telecommunications carriers, (2) local exchange carriers, and (3) incumbent local exchange carriers. 47 U.S.C. § 251(a), (b), and (c). A telecommunications carrier is a provider of telecommunications services, 47 U.S.C. § 153(44), telecommunication services being "the offering of telecommunications for a fee directly to the public . . .," 47 U.S.C. § 153(46), and telecommunications being "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. § 153(43). Both US West and Defendant Sprint Communications Company, L.P., ("Sprint") qualify as telecommunications carriers. A local exchange carrier ("LEC") is "any person that is engaged in the provision of telephone exchange service or exchange access," 47 U.S.C. § 153(26), within an exchange area. 47 U.S.C. § 153(47). An incumbent local exchange carrier is a company that was an existent local exchange carrier on February 8, 1996, and was deemed to be a member of the exchange carrier association. 47 U.S.C. § 252(h). US West qualifies as an incumbent LEC.

Section 251 establishes the duties and obligations of these categories of participants. For example, all telecommunications carriers have a duty "to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers," 47 U.S.C. § 251(a); local exchange carriers have a duty "not to impose unreasonable or discriminatory conditions or limitations on, the resale of its telecommunications services." 47 U.S.C. § 251(b); and incumbent LECs have a duty to negotiate in good faith with telecommunications carriers seeking to enter the local service market, as well as a duty to "offer for resale at wholesale prices any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers." 47 U.S.C. § 251(c). Section 251 requires an incumbent LEC to

provide interconnection that is at least equal in quality to that provided by the incumbent LEC to itself at any technically feasible point, 47 U.S.C. § 251(c)(2); to provide nondiscriminatory access to network elements on an unbundled basis at any technically feasible point, 47 U.S.C. § 251(c)(3); and to provide for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier. 47 U.S.C. § 251(c)(6).

Section 252

Section 252 delineates the procedures for the negotiation, arbitration, and approval of an interconnection agreement that permits a new carrier's entry into the local telephone market. 47 U.S.C. § 252. Once an incumbent LEC receives a request for an interconnection agreement from a new carrier, the parties can negotiate and enter into a voluntary binding agreement without regard to the majority of the standards set forth in § 251 of the Act. 47 U.S.C. § 252(a). If the parties cannot reach an agreement by means of negotiation, after a set number of days, a party can petition a State commission, here the MPUC, to arbitrate unresolved open issues. 47 U.S.C. § 252(b)(1).

An interconnection agreement adopted by either negotiation or arbitration must be submitted for approval to the State commission. 47 U.S.C. § 252(e)(1). The State commission must act within 90 days after the submission of an agreement reached by negotiation or after 30 days of an agreement reached by arbitration. 47 U.S.C. § 252(e)(4). The State commission must approve or reject the agreement, with written findings as to any deficiencies. 47 U.S.C. § 252(e)(1).

FCC Regulations

47 U.S.C. § 251(d)(1) directs the FCC to promulgate regulations implementing the Act's local competition provisions within six months of February 8, 1996. "Unless and until an FCC regulation is stayed or overturned by a court of competent jurisdiction, the FCC regulations have the force of law and are binding upon state PUCs [Public Utility Commissions] and federal district courts." AT&T Communications of California v. Pacific Bell, 1998 WL 246652, at *2 (N.D.Cal. May 11, 1998) (citing Anderson Bros. Ford v. Valencia, 452 U.S. 205, 219-20 (1981)). Review of FCC rulings is committed solely to the jurisdiction of the United States Court of Appeals pursuant to 28 U.S.C. § 2342(1) and 47 U.S.C. § 402(a).

On August 8, 1996, the FCC issued its First Report and Order, which contains the Agency's findings and rules pertaining to the local competition provisions of the Act. Iowa Utils. Bd., 120 F.3d at 792 (citing First Report and Order, In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 F.C.C.R. 15499, CC Docket No. 96-98 (Aug. 8, 1996) ("First Report and Order")). Soon after the release of the First Report and Order, incumbent LECs and State Commissions across the country filed motions to stay the implementation of the Order, in whole or in part. The cases were consolidated in front of the Eighth Circuit. In Iowa Utilities Board, the Eighth Circuit decided that "the FCC exceeded its jurisdiction in promulgating the pricing rules regarding local telephone service." Id. The Eighth Circuit also vacated the FCC's "pick and choose" rule as being incompatible with the Act. Id. at 801. Other provisions of the First Report and Order were upheld by the Eighth Circuit.

On August 8, 1996, the FCC also promulgated the Second Report and Order, which contains additional FCC comments and regulations concerning provisions of the

Telecommunications Act of 1996 that were not addressed in the First Report and Order. The People of the State of California v. FCC, 124 F.3d 934, 939 (8th Cir. 1997), rev'd in part sub nom., AT&T Corp. v. Iowa Utils. Bd., ___ U.S. ___, 119 S.Ct. 721 (1999). Again many local exchange carriers and state commissions filed suit challenging the order. Several cases were combined in front of the Eighth Circuit, which issued another order addressing the FCC's rules. Id.

On January 25, 1999, the Supreme Court reversed a significant portion of the Eighth Circuit's decisions. AT&T Corp. v. Iowa Utils. Bd., 119 S.Ct. at 721. The Supreme Court ruled that the FCC does have jurisdiction to implement local pricing rules and the FCC's rules governing unbundled access, with the exception of Rule 319, are consistent with the Act. Id. at 738. In addition, the Supreme Court upheld the FCC's "pick and choose" rule as a reasonable, and possibly the most reasonable, interpretation of § 252(i) of the Act. Id.

Procedural History

Sprint requested an interconnection agreement with US West on April 15, 1996. (A38; Order Resolving Arbitration Issues at 2). Negotiations between the parties failed to resolve all outstanding issues and Sprint, pursuant to Section 252(b) of the Act, filed a Petition for Arbitration with the MPUC on September 19, 1996. (A1). US West filed a Response on October 15, 1996. (A5). On October 30, 1996, the MPUC granted the petition and referred the matter to the Minnesota Office of Administrative Hearings¹ for evidentiary proceedings before

¹The Office of Administrative Hearings is an independent state agency which employs administrative law judges to conduct impartial hearings on behalf of other state agencies. Minn. Stat. §§ 14.48 and 14.50.

Administrative Law Judge (ALJ) Steven M. Mihalchick. (A7; Order Granting Petition, and Establishing Procedures for Arbitration at 2, 4).

When the evidentiary proceedings commenced on November 12, 1996, the parties had five issues left for arbitration: (1) the most favored nations provision; (2) interim number portability-access revenues; (3) certain cross-class resale restrictions; (4) recombination of unbundled elements; and (5) performance measures and penalties. (A13). After two days of evidentiary proceedings, (A11, A12), the ALJ issued an Arbitrators Report on December 20, 1996. (A32). US West, Sprint, and the Minnesota Department of Public Service ("DPS")² filed exceptions to the Arbitrator's Report on December 27, 1996. (A33-A35).

On January 2, 1997, the MPUC heard oral arguments and voted on the parties' exceptions to the Arbitrator's Report. (A37). On January 15, 1997, the MPUC issued a written order, Order Resolving Arbitration Issues, which directed the parties to file a conforming contract containing all arbitrated and negotiated terms no later than February 14, 1997. (A38; Order Resolving Arbitration Issues at 24). On January 24, 1997, US West filed a Petition for Rehearing, Reargument, and Reconsideration of the January 15, 1997 order. (A39). On May 15, 1997, the parties filed their Negotiated/Arbitrated Terms of Agreement for Interconnection, Resale, and Unbundled Elements. (A45). On July 31, 1997, the MPUC issued an Order Resolving Issues After Reconsideration and Rejecting Contract, which rejected the Agreement submitted by the parties, and specified terms that must be included to obtain MPUC approval. (A53). On August

²The Minnesota Department of Public Services is a state agency charged with the responsibility of investigating utilities and enforcing state law governing regulated utilities, as well as enforcing the orders of the MPUC. The DPS is authorized to intervene as a party in all proceedings before the MPUC. Minn. Stat. § 216A.07.

13, 1997, the parties submitted the conforming portions of the Agreement, (A54-A56, A58), which the MPUC approved on August 26, 1997. (A57, A59).

On September 25, 1997, US West filed the complaint with this Court alleging that the Agreement does not meet the requirements of the Act. In its complaint, US West sought relief on the following grounds: (1) Count I, the agreement imposes unlawful resale requirements; (2) Count II, the agreement imposes an unlawful division of access charges for calls that US West ports to Sprint customers; (3) Count III, the agreement imposes unlawful rebundling requirements;³ (4) Count IV, the agreement imposes interconnection and performance standards that the MPUC had no authority to impose; (5) Count V, the agreement imposes *ultra vires* contractual requirements, such as the requirement to notify the MPUC of any modification or amendment to the approved agreement; and (6) Count VI, the agreement violates the Takings Clause.

II. INTERCONNECTION AND PERFORMANCE STANDARDS

US West alleges that the MPUC unlawfully ordered it to negotiate interconnection and performance standards that are superior to those that it provides itself. US West claims the MPUC directed the parties to negotiate standards that incorporated the superior interconnection and access obligations of FCC regulations that had already been overturned by the Eighth Circuit in Iowa Utilities Board. Specifically, US West cites to the following portion of the MPUC order:

The Commission elects not to approve any of the proposed provisions in total at this time.

³ On September 9, 1998, the Court approved the parties' stipulation agreeing to defer the issues in Count III of US West's complaint until the Supreme Court issued its decision in AT&T Corp. v. Iowa Utils. Bd., ___ U.S. ___, 119 S.Ct. 721 (1999). Because the Supreme Court has since issued its decision, Count III will be addressed in this Order.

Instead, and with grateful acknowledgment of Sprint's and US WEST's willingness to return to the bargaining table, the Commission directs the companies to negotiate acceptable performance standards with the following two provisos in mind: First, the companies have the discretion to include or exclude penalty provisions, as they mutually see fit. Second, U S WEST must provide Sprint with the same level of performance standards and penalties that U S WEST extends to any other CLEC [competitive local exchange carrier], or even a superior level, if Sprint requests it and makes arrangements to pay for it.

(A38; Order Resolving Arbitration Issues at 22-24). US West claims the MPUC's order forced it to enter into the following performance standards and penalties provisions with Sprint:

Unless the Parties agree otherwise, the AT&T Supplier Performance Quality Management System Metrics and Gap Closure Plans, and Direct Measures of Quality (DMOQs) as set forth in Attachment 11 to the Arbitrated Interconnection Agreement between AT&T Corporation and U S WEST Communications, Inc. approved by the Commission are incorporated as a part of this agreement.

(A45; Negotiated/Arbitrated Terms of Agreement for Interconnection, Resale, and Unbundled Elements at § 34).

The MPUC counters that its order did not force US West to incorporate the FCC's vacated superior interconnection and access obligations into its agreement with Sprint. The MPUC argues that it did impose a threshold of quality but that it did not mandate the adoption of the performance standards from the arbitrated Interconnection Agreement between US West and AT&T. Furthermore, the MPUC could not fully determine the quality standards that US West applied to itself, so whether the performance standards ultimately adopted by the parties require superior quality is in doubt. In addition, the MPUC states that it did not base its decision on the FCC's rules, but rather on concerns about service quality in Minnesota. The MPUC believes it has the authority under state law to order and implement its own quality of service requirements, including the requirement of superior quality, and that its quality concerns are justified in light of

US West's history of service quality problems.

Echoing the MPUC, Sprint contends that there is no evidence that the Agreement requires US West to offer superior quality service to Sprint. Sprint states that the parties voluntarily agreed to the relevant provision and that nothing in the Act or the Iowa Utilities Board decision prohibits an incumbent LEC from negotiating superior quality requirements.

The Telecommunications Act requires that an incumbent LEC provide a requesting telecommunications carrier interconnection with its network "that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the party provides interconnection" 47 U.S.C. § 251(c)(2)(C). The FCC promulgated Rule 51.305(a)(4) requiring incumbent LECs to provide superior quality interconnection on demand, and Rule 51.311(c) requiring incumbent LECs, in return for additional payments, to provide superior quality access to unbundled network elements on demand. In Iowa Utilities Board, the Eighth Circuit vacated these FCC rules as violating the plain terms of the Act. Iowa Utils. Bd. v. FCC, 120 F.3d at 812. It found that the Act "does not require incumbent LECs to provide its competitors with superior quality connection." Id. The Eighth Circuit explained that "[w]hile the phrase 'at least equal in quality' leaves open the possibility that incumbent LECs may agree to provide interconnection that is superior in quality when the parties are negotiating agreements under the Act, this phrase mandates only that the quality be equal—not superior. In other words, it establishes a floor below which the quality of the interconnection may not go." Id. The Eighth Circuit went on to state that it does not matter if the incumbent LECs are compensated for the superior quality interconnection, because the Act simply does not require such a level of quality. Id. at 813.

For the purpose of this Order, the Court will assume, without deciding, that the MPUC's order compelled US West to enter into the disputed performance standard and penalties provision with Sprint. If the Act was the MPUC's sole basis for its authority, the MPUC would have exceeded its authority when it directed US West to provide superior service. The Eighth Circuit explicitly stated that the Act does not require incumbent LECs to provide superior quality connections to its competitors. However, the MPUC did not rely solely on the Act for its authority.

The Act provides that a state commission can establish "other requirements of State law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements." 47 U.S.C. § 252(e)(3). It is appropriate for a state commission to implement its own state's laws during the review process providing those laws do not conflict with or hamper the federal act. Although the Eighth Circuit stated that the Act does not require an incumbent LEC to offer a superior level of service, a state requirement of superior quality interconnection would not conflict with the Act.

The MPUC's order reveals that it relied on Minnesota law, at least in part, in reaching its decision concerning performance standards. In the "Applicable Law Section" of its order, the MPUC directly cited to a Minnesota statute. (A38; Order Resolving Arbitration Issues at 22 (citing Minn. Stat. 237.081)). In its "Commission Decision" section, the MPUC referenced language of its state-imposed statutory duty "to ensure the provision of high quality telephone service throughout the state." Minn. Stat. § 237.16, subd. 8, such as when it stated that consumers "would receive service of adequate quality," (A38; Order Resolving Arbitration Issues at 23), and "[s]pecificity serves the interest of end users directly by establishing clear